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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1772**

Jason Comstock,
Relator,

vs.

Seneca Foods Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 3, 2013
Affirmed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 29703100-5

Jason Comstock, Rochester, Minnesota (pro se relator)

Seneca Foods Corporation, Marion, New York (respondent)

Lee B. Nelson, Colleen Timmer, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department of Employment and
Economic Development)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator challenges the order of an unemployment-law judge affirming the dismissal of relator's appeal from an initial determination of ineligibility for unemployment benefits for failure to participate in the hearing. We affirm.

FACTS

Relator Jason Comstock was terminated from his employment with respondent Seneca Foods Corporation for falsifying a doctor's note. Comstock applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) denied the application after concluding that he was terminated for employment misconduct. Comstock appealed the determination of ineligibility and an evidentiary hearing was scheduled.

On the date of the scheduled hearing, the unemployment-law judge (ULJ) attempted multiple times over the course of 15 minutes after the scheduled beginning of the hearing to reach Comstock at the telephone number that Comstock had supplied to DEED. Comstock did not answer the telephone or respond to the ULJ's messages, and Comstock did not contact DEED. After failing to contact Comstock, the ULJ issued an order dismissing his appeal because Comstock "failed to personally participate in the hearing" and "is considered to have failed to exhaust available administrative remedies."

Three days later, Comstock appealed the dismissal by filing a request for reconsideration that stated that he missed the call because of a medical issue involving his mother. The ULJ concluded that this constituted a "good cause" for missing the hearing.

The ULJ issued an order setting aside the original dismissal and scheduled a second evidentiary hearing.

The ULJ was able to reach both Comstock and the human resources manager at Seneca Foods at the beginning of the second evidentiary hearing. The ULJ began the hearing by explaining the process for the hearing, telling the parties that he would go through the procedural parts of the hearing first and would then take testimony from each party. The parties would then be able to add anything they felt was missed, cross-examine and be cross-examined by the other party, submit rebuttal testimony, and make an optional closing statement at the end of the hearing. Comstock and the human resources manager both indicated that they understood this process.

The ULJ requested preliminary information from Comstock, including his name and address. The ULJ then identified the exhibits and began taking testimony from the human resources manager. Partway through the human resource manager's testimony, Comstock disconnected from the phone call. The ULJ made multiple attempts to contact Comstock in the 15 minutes following his disconnection from the call. The ULJ left a message every time and told Comstock that failure to call and explain why he dropped off the phone call would result in a dismissal of the appeal. Comstock never returned the ULJ's calls and made no other attempt to contact the ULJ or DEED.

The ULJ again dismissed Comstock's appeal. Comstock again requested reconsideration of the dismissal, stating on his request: "I was disconnected from the call. I have been having a problem with [S]print and [I] still am. Also the conduct reports that [the employer] submitted were wrong and were written after [I] was terminated." The

ULJ concluded that Comstock had not shown good cause for failing to participate in the hearing, and affirmed the dismissal. Comstock then initiated this certiorari appeal.

D E C I S I O N

I. Standard of review

When reviewing an unemployment-benefits decision, this court may remand, reverse, or modify a ULJ's decision if the relator's substantial rights may have been prejudiced because the findings, conclusion, or decision are affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (2010). We review a ULJ's decision to decline a request for an additional hearing for an abuse of discretion. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

When a party appeals a determination of ineligibility, he must personally participate in the subsequent evidentiary hearing before a ULJ. Minn. Stat. § 268.105, subd. 1(d) (2010). If an appealing party fails to participate in a scheduled hearing, the ULJ "has the discretion to dismiss the appeal by summary order." *Id.* The appealing party "is considered to have failed to exhaust available administrative remedies" unless he seeks reconsideration and shows "good cause for failing to participate in the evidentiary hearing." *Id.* If a party shows good cause for failing to participate in an evidentiary hearing, the ULJ must order an additional evidentiary hearing. *Id.*, subd. 2(d) (2010); *see id.*, subd. 1(d). "Good cause" is defined as "a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing." *Id.*, subd. 2(d).

II. Dismissal for failure to personally participate

In his request for reconsideration of the second dismissal of his appeal, Comstock stated that he was having trouble with his cell phone provider, and he was disconnected during the call. The ULJ cited several reasons for finding that this was not “good cause” for failing to personally participate in the hearing: (1) Comstock indicated that this was an ongoing problem that he knew about at the time of the hearing; (2) parties are “responsible for making alternative arrangements if their regular number is not working”; (3) the instructions provided to parties tell them to call DEED if they are not contacted within ten minutes; and (4) the ULJ gave Comstock until the end of the day on August 7, 2012, to call back, explain the problem, provide an alternate phone number, and/or request a continuance. The ULJ’s stated reasons for affirming the dismissal support the determination that Comstock did not show good cause for failing to participate in the hearing.

On appeal, Comstock states a totally different reason for failing to participate in the second hearing. He asserts that “[d]uring the evidentiary hearing, [he] answered the [ULJ’s] questions he asked at the very beginning of the hearing. When [the ULJ] thanked me for providing my answers to his questions, I understood that this ended the phone call and disconnected at that time.” This argument for failing to personally participate in the evidentiary hearing was not brought before the ULJ. This court “may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.” *Plowman v. Copeland, Buhl & Co., Ltd.*, 261 N.W.2d 581, 583 (Minn. 1977). We therefore do not

consider Comstock's new argument except to note that, in light of the ULJ's description of the hearing process given at the beginning of the hearing and the fact that Comstock received a written description of the hearing process prior to the hearing, the argument does not appear to be reasonable or credible. And because the ULJ's dismissal of Comstock's appeal was not an abuse of discretion, we do not reach the merits of Comstock's challenge to the determination of ineligibility.

Affirmed.